

DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO MOTION OF
ALLIANCE OF NONPROFIT MAILERS TO COMPEL PRODUCTION OF MAIL
ACCEPTANCE LOGS UNDERLYING USPS-RT-22 OR, IN THE ALTERNATIVE, TO
STRIKE PORTIONS OF THAT TESTIMONY
(March 19, 1998)

The United States Postal Service hereby responds in opposition to the Motion of the Alliance of Nonprofit Mailers to Compel Production of Mail Acceptance Logs Underlying USPS-RT-22, or, In the Alternative, to Strike Portions of That Testimony, filed March 17, 1998. Neither of the forms of relief requested in the motion are warranted, and it should be overruled in its entirety.

Background

As ANM correctly notes in its Motion, this dispute has been the subject of considerable attention by the Presiding Officer and the Commission. On December 9, 1997, the Alliance directed discovery requests ANM/USPS-18-26 to the Postal Service. Interrogatory 20 asked for certain volume information, for three specific time periods. Specifically, it requested data on how many mailings that were "prepared for entry at Standard A (formerly third-class) nonprofit rates were in fact entered at commercial rates...because the Postal Service determined, before or during entry of the mail, that it did not qualify for Standard A (or third-class) nonprofit rates." It also requested, for each mailing identified, whether the mailer had been

required to correct the permit imprint, meter stamp, or postage to indicate that the mailing was being sent as anything other than nonprofit rates. Interrogatory 21 asked for data for the same time periods on the volume of mail originally entered at Standard A nonprofit rates, for which its mailers were later required to pay back postage, because the Postal Service determined that the mail was improperly sent as nonprofit.

The Postal Service objected to these interrogatories, along with others filed at the same time by ANM, on the grounds that they were grossly out of time under any of the Commission's deadlines for discovery on the Postal Service's direct case, and that responding to the information requested by the discovery requests would entail an inordinate degree of burden. *See Objection of the United States Postal Service to Interrogatories of the Alliance of Nonprofit Mailers*, December 19, 1997. The Postal Service noted that the undertaking of collecting the information that would be required to respond to ANM's questions was even more unwarranted, given the fact that ANM had waited until nearly three months after the close of discovery on the Postal Service's direct case to propound its questions. *USPS Objection* at 3.

The Alliance moved to compel production of responses to its discovery requests. *Motion of the Alliance of Nonprofit Mailers to Compel Answers to Interrogatories and for Permission to File Supplemental Testimony within Two Weeks of Receipt of Answers from the USPS*, December 22, 1998. In its Opposition to ANM's motion, and in discussion with counsel for ANM, the Postal Service repeatedly and clearly stated that it found objectionable, not only the burden required in assembling the information requested by ANM, but the fact that it was being asked to undertake this burden to respond to discovery filed in clear contravention of the Commission's timing requirements. *See Opposition of the*

United States Postal Service to Motion of the Alliance of Nonprofit Mailers to Compel Answers to Interrogatories and for Permission to File Supplemental Testimony within Two Weeks of Receipt of Answers from the USPS, December 22, 1997. ANM's current motion neglects to mention that the Presiding Officer relied on the timing of ANM's discovery requests. In particular, in making his determination to deny ANM's Motion to Compel responses to ANM/USPS-20, 21, 25 and 26, he relied on the principal that "[a]ll parties are...obliged to make a reasonable effort to focus discovery requests, submit them in a timely fashion and accordingly respond to complying submissions, particularly in light of the compressed schedule" in this proceeding. *Presiding Officer's Ruling No. R97-1/86*, at 7. He concluded that "ANM's interrogatories should have been submitted during discovery on the Service's direct evidence." *Id.* at 7-8. The full Commission affirmed the Ruling, observing that "[i]n this case the procedural schedule was previously adjusted, and ANM had more than four months to pursue this line of inquiry with Postal Service witnesses Degen and Pafford available for cross examination on questions of this nature." *Commission Order No. 1207, Affirming Presiding Officer's Ruling No. R97-1/86*, at 7, February 9, 1998.

The Rebuttal Testimony of Leslie M. Schenk, USPS-RT-22

ANM's current motion to compel insinuates that, in light of Dr. Schenk's rebuttal testimony (USPS-RT-22), the Postal Service was disingenuous in its claims regarding the burden that would be involved in responding to ANM's December 9 interrogatories. *ANM Motion* at 8. Dr. Schenk's testimony, however, which presents a limited, qualitative survey of business mail acceptance practices regarding Standard (A) nonprofit mail, is not in any way inconsistent with the Postal Service's earlier arguments concerning the burden of responding to ANM's specific discovery

requests.¹

The disputes over ANM's discovery requests were appropriately decided by the Presiding Officer and the Commission on the prevailing facts at the time and Commission precedent. Once ANM elected to submit evidence advancing its own proposals, however, the circumstances changed. In testimony from its own expert witness, Dr. Haldi, and in its pleadings, ANM described in detail its theory of a "non-synchronization" between the RPW-reported volumes and IOCS-reported costs relative to nonprofit Standard (A) mail. See Tr. 22/11807-16. Dr. Haldi further presented the results of ANM's own survey, which he offered as the basis for a quantitative estimate of volumes, and a proposal to shift substantial costs away from their appropriate allocation. At that point, the Postal Service was faced with a choice. It could leave un rebutted Dr. Haldi's testimony supporting a theory of cost misallocation that, if it erroneously were to be considered credible, could significantly undermine its proposals.² Alternatively, the Postal Service could undertake an effort that clearly was not required in discovery, namely, to conduct an inquiry to set the record straight.

The Postal Service's decision to develop rebuttal testimony was completely appropriate and reasonable under the circumstances presented. Because of the nature of the rebuttal needed, the limitations on its own resources, and the

¹ At page 5 of ANM's motion, pages 11-20 and 25-29 of USPS-RT-22 are cited as "purportedly quantifying 'the degree to which nonprofit IOCS costs are overstated because volumes and costs are inconsistent.'" The Postal Service notes that it is only pages 15-16, and 25-29, of Dr. Schenk's rebuttal testimony, which rely on the survey that she conducted.

² In this regard, it is worth noting that the Commission, in upholding Presiding Officer's Ruling No. R97-1/86, acknowledged that this theory was reasonably unanticipated by the Postal Service at earlier stages of the proceedings. *Commission Order No. 1207*.

complexity of the issues involved, the Postal Service elected to employ the services of a contractor who was able to devote full time to conduct the study. ANM now appears to be arguing that the Postal Service was under an obligation to take such a step solely for the purpose of responding to interrogatories to which the Postal Service objected on other grounds. As affirmed by the Presiding Officer and the Commission, however, the Postal Service had no such obligation.

Furthermore, the performance of the survey on which a portion of Dr. Schenk's testimony is based is not inconsistent with the Postal Service's descriptions of the burden that would have been imposed in order to provide the information specifically requested by ANM's improperly-posed December discovery requests. ANM's interrogatories were not limited in scope. In this regard, we note that it was only in a footnote to ANM's appeal to the Presiding Officer's denial of its motion to compel responses that ANM suggested that it *might* be satisfied with a survey of facilities.

Disqualification Logs and Acceptance Logs Sought by ANM

Dr. Schenk's survey clearly does *not* respond to the discovery requests made on December 9, and ANM's predominant focus on the acceptance logs and disqualification logs maintained by some of the facilities sampled by Dr. Schenk is similarly misplaced. ANM asserts that, "by the Postal Service's own description, the documents are clearly responsive to Interrogatory ANM/USPS-21(a), for they contain the very kind of information that ANM sought to discover — *i.e.*, the volume[s]" of mailings requested in ANM's December interrogatories. The references to the *disqualification logs and acceptance logs* in Dr. Schenk's testimony, however, do not support the conclusion that they contain the volume data that ANM requested. While Dr. Schenk observed that the "*only information* available to determine the *degree* to which nonprofit mailings disqualified during acceptance are mailed with

nonprofit indicia, but pay regular rates, are 'disqualification logs' maintained by acceptance units," USPS-RT-22 at 25 (emphasis added), she does not indicate, in her testimony or elsewhere, that the logs contain comprehensive volume data.

In fact, these documents are often silent as to whether any mailings were changed from nonprofit to commercial rates, generally do not contain volume information, and sometimes do not even contain revenue deficiency amounts. The logs contain the names of mailers, their permit numbers, the class of mail under which the mailing was entered (i.e., First-Class, Periodicals, Standard Mail), either a code or a note defining the problem with the mailing, and a coded response as to what was action taken with it. These logs, furthermore, were only one of a number of sources that the Postal Service had to consult in order to conduct the special inquiry performed to rebut the claims of Dr. Haldi.

Moreover, ANM either misunderstands or intentionally overstates the importance of the acceptance logs to Dr. Schenk's analysis. At page 5 of its motion, ANM claims that the Postal Service's study was "based in large part on 'acceptance logs' or 'disqualification logs'... — business records whose existence the Postal Service had failed to disclose in response to ANM's discovery requests." ANM also asserts that Dr. Schenk's survey was intended to "supplement this information," *ANM Motion* at 5, implying that the Postal Service used *both* the survey and acceptance/disqualification log data. In fact, as described in Dr. Schenk's testimony, "many sites discard the logs after one year", USPS-RT-22 at 25, line 8, and the survey itself was done because the logs were no longer available.

ANM's arguments that the Postal Service should have filed the logs as workpapers supporting Dr. Schenk's testimony are similarly misplaced. ANM's exploration of several of the provisions of Rule 31 of the Commission's Rules of

Practice attempt to indicate that the Postal Service has not complied with the Rule. However, ANM's reading of the rule attempts to apply, willy-nilly, sections from the rule that are mutually exclusive. Rule 31(k)(1) specifies that it applies to "all studies and analyses offered in evidence in hearing proceedings or relied upon as support for other evidence, *other than the kinds described in paragraphs (k)(2) and (3) of this section . . .*" 39 C.F.R. § 3001.31(k)(1) (emphasis added). Rule 31(k)(2) applies to statistical studies, like the one conducted by Dr. Schenk. Therefore, according to the very language of Rule 31(k)(1), 31(k)(2) becomes the measure of requirements for the study. ANM's reference to 31(k)(1) is not appropriate.

Moreover, Rule 31(k)(3)(i), also cited by ANM, applies to computer analyses being offered in evidence, and requires the production of "a listing of the input and output data and source codes" and a "machine-readable copy of all data bases" used. Because Dr. Schenk's study is not a computer analysis, this provision also is not applicable to her testimony.

Therefore, only the provisions of Rule 31(k)(2) govern what witness Schenk was required to provide, and the requirements of this subsection have been met. Rule 31(k)(2) contains some general requirements, then is divided into three subparts: (i) sample surveys, (ii) experimental analysis, and (iii) econometric surveys.³ Rule 31(k)(2)(i), dealing with sample surveys, is the portion applicable to Dr. Schenk's testimony. It indicates that the proponent of a sample survey must "include a comprehensive description of the assumptions made, the study plan utilized, and the procedures undertaken." 39 C.F.R. § 3001.31(k)(2). This information appears in

³ Rule 31(k)(2)(f), which ANM quotes as "requiring production of 'summary descriptions and source citations for all input data and, upon request, a complete listing of the data' underlying sample surveys," *ANM Motion* at 7, does not exist. Rule 31(k)(2)(iii)(f), which reads as quoted by ANM, applies to econometric studies. Dr. Schenk's testimony is not an econometric study.

Appendix B of Dr. Schenk's rebuttal testimony.

The specific provisions of Rule 31(k)(2)(i) also require the following:

- (a) A clear description of the survey design, including the definition of the universe under study, the sampling frame and units, and the validity and confidence limits than [sic] can be placed on major estimates; and
- (b) An explanation of the method of selecting the sample and the characteristics measured and counted.

The information required in Rule 31(k)(2)(i)(a) is provided in Appendix B to witness Schenk's testimony, as is the "explanation of the method of selecting the sample" required by Rule 31(k)(2)(i)(b). The characteristics measured and counted are described on the survey forms used by Dr. Schenk.⁴ The completed survey forms relied upon by Dr. Schenk are being filed today in Library Reference H-353. Accordingly, the pertinent information necessary to evaluate witness Schenk's testimony has not been withheld from ANM or other participants.

"Input Data" Relied Upon in USPS-RT-22

Most importantly, by providing ANM with copies of each of the survey responses used by Dr. Schenk, the Postal Service has provided ANM with all of the "input data" that Dr. Schenk relied upon in reaching the conclusions in her testimony. The study is qualitative, and Dr. Schenk's testimony clearly states that she relied upon the survey responses that have been provided to ANM, not the logs that ANM now seeks.

⁴ A copy of the form used was inadvertently not included in the testimony of Dr. Schenk, and was filed on Monday, March 16, 1998. See *Notice of the United States Postal Service Regarding Errata to the Rebuttal Testimony of Witness Schenk (USPS-RT-22)*, March 16, 1998. A copy of the form was sent via facsimile to counsel for ANM on Friday, March 13, 1998.

ANM attempts to reinforce its argument that access to the logs is a essential by contending that Dr. Schenk's reliance on Postal Service employees to respond to her survey is the equivalent of "hearsay upon hearsay" and is nothing more than a "glorified game of 'telephone.'" *ANM Motion* at 7-8. Once again, ANM's arguments betray its confusion with Dr. Schenk's testimony.⁵ First, ANM's description of the *string of communications involved* (page 8 of its motion) is not accurate. The information on survey forms was not "summarized...for Dr. Schenk," as ANM surmises; she worked with copies of the survey forms themselves, and even performed several of the telephone surveys herself. ANM is, of course, free to cross-examine Dr. Schenk on the reliability of the data collection procedures.

ANM's attempts further to buttress its claim that the logs are essential by arguing that Dr. Schenk's survey results may be biased. Presumably, the logic of this argument involves the implication that the employees surveyed misrepresented the contents of the logs. Thus, only by inspecting them directly can ANM verify that the information conveyed in the survey interviews is accurate. This argument does not establish access to the information underlying the survey as a prerequisite to sustaining the status of the rebuttal testimony. Nor does it justify striking Dr.

⁵ Fundamentally, ANM appears to be ignoring the rather obvious fact that, given an organization of the size, scope, and structure of the Postal Service, any attempt to gather information in a fashion that makes any effort to be representative will usually require reliance on data gathering and reporting by many individuals. The Postal Service, for example, can not be expected to bring in data collection technicians to testify regarding each IOCS tally that they personally recorded. And, in fact, telephone tallies are a common occurrence in IOCS. The presumption that postal employees can accurately convey information about their work over the telephone is neither unreasonable, nor unique to the analysis presented by Dr. Schenk.

Schenk's testimony, especially given the limited role of the logs.

In the first place, the Postal Service maintains that the claim of bias is unfounded. ANM contends that bias arises from concerns by Postal Service personnel about their own conduct in relation to Postal Service regulations. ANM suggests that these concerns likely led to the employees underreporting volumes in the face of questioning from Postal Service headquarters management. *Id.* These fears, however, are baseless. The Postal Service personnel who were interviewed were not necessarily the employees to whom the letter from Ms. Bizzoto introducing the study was sent. In fact, in the course of conducting the survey, Dr. Schenk found that most of the personnel who provided the information for the survey had not seen Ms. Bizzoto's letter, but had simply been told by their supervisor to respond to the questions posed by Dr. Schenk. Moreover, none of the employees with whom Dr. Schenk spoke regarding the Christensen Associates survey expressed any concerns that the information they were going to give would get them in trouble. The only reluctance encountered in the conduct of the survey came from employees whose facilities did not maintain the logs, and who did not have the tenure necessary to make informed estimates. These personnel were not forced to make estimates; the sites affected are shown in Exhibit 2 of USPS-RT-22 as responding to the survey, but not having completed it.

These contentions can be tested and challenged by ANM through cross-examination of Dr. Schenk, as the person who conducted the survey, interviewed the employees, and drew conclusions based on their statements. Furthermore,

ANM is free to criticize the study on the basis of bias and argue the point on brief. The availability of that argument, in itself, however, does not establish that the provision of the logs is indispensable to the survey's documentary foundation, given the role of the logs and the limitations on discovery at the rebuttal stage.

ANM's Requested Relief is Not Appropriate

As relief, ANM asks that the Commission, in lieu of striking this portion of Dr. Schenk's testimony, direct the Postal Service to produce the logs referred to by Dr. Schenk, that she be recalled to respond to oral cross-examination on them, and that ANM should be permitted to file surrebuttal testimony.

Producing these logs, however, is not as simple a matter as ANM seems to suggest. Obtaining them, if they are even available, redacting any confidential information, and recoding the information in order to enable others to identify the nonprofit mailings would take a great deal of effort, even if the inquiry were limited to the sample sites used by Dr. Schenk. It is the opinion of the Postal Service that this effort could take considerably longer than the week period first communicated to counsel for ANM. This estimate comprises the following components:

- Obtaining the copies of acceptance or disqualification logs from the sample sites (for FY96, if available, or for FY97 or FY98, if these were used as proxies) would require Postal Service personnel to be pulled from their regular duties, and in many cases search through storage areas for the logs, photocopy all the pages, and send what would likely be multiple boxes to Christensen Associates.⁶

⁶ According to Dr. Schenk, at one of the smaller sites responding to her survey, the acceptance logs consisted of an average of twenty pages per accounting period. The acceptance logs at larger sites would have many more pages per accounting period.

- Redacting all the confidential information on these logs would take an extensive amount of work. Moreover, redacting customer names and permit numbers would render it impossible to even tell which entries were nonprofit mailings, since this information is not coded on the logs separately. Therefore, the Postal Service would have to recode each entry on the logs to provide that information. Given that there are 10-15 entries per page of the log, and an average of twenty pages per accounting period for the smaller sites, there would be at least 260 entries for each accounting period that would have to be redacted and recoded (over 3,000 entries per site, for sites with this level of activity).
- Finally, as described above, the disqualification logs do not themselves usually contain information on the volumes of the mailings rejected or ruled ineligible, or even the revenue deficiency. This information would have to be obtained separately, by going through the files of individual customers or looking up individual transactions in the PERMIT system.

It is difficult to assess the length of time that would be required to perform all of these steps, but an estimate of several weeks would not be out of the question. As explained throughout this document, this effort would not likely yield information that was either focal to the development of Dr. Schenk's rebuttal testimony, or probative to the questions that ANM claims to wish to answer.

Conclusion

ANM's December 22, 1997 Motion to Compel complains that

One would have assumed that the Postal Service would want to do everything in its power to verify the integrity of the data on which it is asking the Commission to rely. The Postal Service, however, while professing ignorance about the cause of the disproportionate increase in the costs attributed to nonprofit mail, has met ANM's discovery requests with a barrage of objections.

Motion of the Alliance of Nonprofit Mailers to Compel Responses to Interrogatories, December 22, 1997, at 5. In submitting the rebuttal testimony of Dr. Schenk, the Postal Service has presented the answers that ANM claims it wishes to find.

Ironically, ANM, faced with real information on the degree to which nonprofit mailings are (not) being improperly recorded by the Postal Service's data systems, now seeks to prevent this information from being received into the record. ANM is doing this by latching onto a small portion of Dr. Schenk's testimony, attempting to take it out of context of the rest of the—entirely consistent—testimony, and elevating the fact that it does not have these logs to the level of a due process violation. ANM's hyperbole is merely an inflation of the importance of the logs it seeks, and the latest in a string of delay tactics by which ANM seeks to derail this proceeding.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

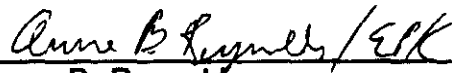
By its attorneys:

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.


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